No. 6416

United States Circuit Court of Appeals For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Co-Partnership composed of Leo Francis, Lyan Francis and D. L. Francis, co-partners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Co-Partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

Brief for Appellant

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STATEMENT OF THE CASE.

This is an appeal brought by the Standard Sanitary Manufacturing Company, a corporation, from a decision of the United States District Court for the District of

Arizona, in the case of Momsen-Dunnegan & Ryan, et al., petitioners for the involuntary bankruptcy of Phoenix Plumbing & Heating Company, a copartnership, consisting of Leo Francis, Lyon Francis and Dee Francis.

The decision of the United States District Court for the District of Arizona in question was based upon a report of R. G. Smith, Special Master, filed in the United States District Court for the District of Arizona on February 18, 1930.

On August 17, 1929, Momsen, Dunnegan & Ryan, Pratt-Gilbert Company, and the Union Oil Company, a corporation, filed a petition in the said court praying for the adjudication in bankruptcy of the said Phoenix Plumbing & Heating Company, setting up in said petition a number of alleged acts of bankruptcy, among which was the allegation that on or about the 5th day of June, 1929, the said Phoenix Plumbing & Heating Company had committed an act of bankruptcy by paying to the Standard Sanitary Manufacturing Company $13,000, money received by the said Phoenix Plumbing & Heating Company from the Lincoln Mortgage Company.

The Phoenix Plumbing and Heating Company conducted a plumbing, heating and sheet metal business. That is to say, they were engaged in the business of installing plumbing, heating apparatus, and sheet metal work in various buildings throughout Maricopa County, Arizona. In the year 1928 the said Phoenix Plumbing & Heating Company entered into an agreement with the Lincoln Mortgage Company, by the terms of which they

agreed to install heating and plumbing apparatus in a number of buildings then in construction or to be constructed by the Lincoln Mortgage Company. The material for these jobs, consisting of plumbing supplies, heating apparatus, etc., was purchased by the Phoenix Plumbing & Heating Company from the Standard Sanitary Manufacturing Company, which was at that time and now is a corporation engaged in the wholesale plumbing and heating supply business, dealing exclusively with retail plumbing concerns in the State of Arizona.

On the 5th day of March, 1929, the Phoenix Plumbing & Heating Company owed the Standard Sanitary Manufacturing Company some $30,000 for materials purchased and installed in various jobs, among which were the Lincoln Mortgage Company jobs. At that time the Phoenix Plumbing & Heating Company owed various accounts to the Crane Company, and to the Commercial National Bank of Phoenix for money loaned, but had as assets not only the usual equipment of a concern of that kind but also a large number of contracts partly finished, and in the course of execution on numerous public buildings and private residences in and about the City of Phoenix, Maricopa County, Arizona. The exact aggregate of these contracts on the 5th day of March, 1929, is not shown in the testimony, but it does appear from the evidence that the Phoenix Plumbing & Heating Company was then considered a going, solvent concern, with a very good line of credit, not only with the bank but with its various creditors.

The Standard Sanitary Manufacturing Company on that date received from the Phoenix Plumbing & Heating Company an assignment of its claim of all the moneys then due or to become due from the Lincoln Mortgage Company under the various contracts for the installation of plumbing apparatus and heating apparatus that the Phoenix Plumbing & Heating Company had with the Lincoln Mortgage Company. The assignment, which is respondent's Exhibit C in evidence, was in words and figures as follows:

"PHOENIX PLUMBING & HEATING COMPANY
316 North Sixth Avenue
Phoenix, Arizona

March 5th, 1929.

Standard Sanitary Mfg. Co.,
447 East Jefferson St.,
Gentlemen:

You are by this instrument authorized to draw on Lincoln Mortgage Co., of this city in the amount of Fourteen Thousand One Hundred Ninety Six Dollars Seventy Seven Cents ($14,196.77).

Which sum represents money due this firm for work and materials furnished in the construction of various houses and store buildings owned by the aforesaid Lincoln Mortgage Co.

This assignment effective this date.

PHOENIX PLUMBING & HEATING CO.
By D. Frances."

Thereupon this assignment was taken to the Lincoln Mortgage Company and accepted by that company. (Statement of Evidence, p. 419, and p. 335, 2nd par.)

Thereafter the Standard Sanitary Manufacturing Company continued to extend credit to the Phoenix Plumbing & Heating Company and delivered material to its various jobs up to the first week in August, 1929.

On or about the 5th day of June, 1929, the then manager of the Phoenix Plumbing & Heating Company, one Fryberger, and the manager of the Standard Sanitary Manufacturing Company, went to the Lincoln Mortgage Company and obtained from that company a check payable to the Phoenix Plumbing & Heating Company in the sum of $14,000. (Statement of Evidence, p. 442). Fryberger and the manager of the Standard Sanitary Manufacturing Company then went to the Citizens State Bank, upon which the check was drawn, and the check was cashed, the Citizens State Bank making in lieu thereof a check for $13,000 payable to the Standard Sanitary Manufacturing Company and a check for $1,000 payable to the Phoenix Plumbing & Heating Company.

After the petition in involuntary bankruptcy was filed the Standard Sanitary Manufacturing Company, within the time provided by the rules of the District Court, filed its answer to the involuntary petition, setting up therein, among other things, the assignment of the Lincoln Mortgage Company account to the Standard Sanitary Manufacturing Company on the 5th of March, 1929, and the acceptance by the Lincoln Mortgage Company of the said assignment and the payment according to the terms of said assignment on the 5th of June, 1929.

The Crane Company, another creditor, also answered the petition in involuntary bankruptcy, and thereafter the issues raised by the said petition and answers thereto were referred to Judge R. G. Smith, Refereee in Bankruptcy, as a special master to hear evidence on the same and report to the United States District Court. The hearings began on or about the 18th of November, 1929, and continued intermittently until January, 1930, and on the 18th of February, 1930, the said Special Master reported to the United States District Court. The said report declared the Phoenix Plumbing & Heating Company bankrupt and found as a matter of fact that they weer insolvent for the four months prior to the 17th day of August, 1929, and found, among other acts of bankruptcy:

> "16. That on or about June 10th, 1929, and within four months next preceding the filing of the petition herein, the said alleged bankrupts, Phoenix Plumbing & Heating Company, a copartnership, and Leo Francis, Lyon Francis and D. L. Francis, did, while insolvent, transfer and pay over to Standard Sanitary Manufacturing Company, a corporation, creditor, a portion of their property, to-wit, money in the sum of Thirteen Thousand ($13,000.00) Dollars with intent to prefer said creditor over their other creditors."

And upon the said finding of fact the Special Master found as a conclusion of law:

> "4. That the said alleged bankrupts and each of them did, on or about June 10th, 1929, and within

four months next preceding the date of filing of the involuntary petition herein, commit a further act of bankruptcy by transferring and paying over, while insolvent, to Standard Sanitary Manufacturing Company, a corporation, the sum of Thirteen Thousand ($13,000.00) Dollars in money."

From this finding of fact and conclusion of law the Standard Sanitary Manufacturing Company excepted to the United States District Court, which exceptions were argued before the said court on the 10th day of June, 1930, and a decision rendered sustaining the Master's report in toto. From this judgment the Standard Sanitary Manufacturing Company, appellant herein, appealed to this court, confining its appeal to the finding of fact and conclusion of law covering the so-called Lincoln Mortgage Company transaction, and the question of insolvency prior to the 20th day of July, 1929.

In making this appeal the Standard Sanitary Manufacturing Company did not file a supersedeas bond, but filed a cost bond in the sum of $1500 and thereafter entered into a stipulation with the attorney for the Trustee in Bankruptcy by the terms of which it was provided that the scope of the appeal of the Standard Sanitary Manufacturing Company was and is confined to the Lincoln Mortgage Company transaction, and the question of insolvency insofar as the same affects said transaction.

The Standard Sanitary Manufacturing Company did not at any time in the proceedings raise any question whatsoever as to the adjudication on the 17th of August,

1929, nor to the findings of fact and conclusions of law on other acts of bankruptcy save the Lincoln Mortgage Company transaction.

On the appeal the Standard Sanitary Manufacturing Company specified the portions of the record which it deemed necessary to enable this court to decide the question as to whether or not the Lincoln Mortgage Company transaction between the Phoenix Plumbing & Heating Company and the Standard Sanitary Manufacturing Company was an act of bankruptcy, and thereafter the atorney for the Trustee in Bankruptcy and the attorney for the petitioners in involuntary bankruptcy, namely, Momsen, Dunnegan & Ryan, Pratt-Gilbert Company, and the Union Oil Company, filed a praecipe for the inclusion in the record on appeal of all exhibits and of evidence pertaining to not only the question raised by the appeal, but the question of the partnership liability, the individual liability as bankrupts, the various acts of bankruptcy set up in the Master's report; in fact the whole record, which act on the part of counsel for the Trustee and for the petitioning creditors greatly increased the cost of said records and encumbered the same with a great mass of extraneous and irrelevant matter that was not and is not necessary for the decision of the question brought before this court by the appellants herein.

ASSIGNMENTS OF ERROR.

I.

The Court erred in overruling the objection of the Standard Sanitary Manufacturing Company to that por-

tion (517) of the Special Master's Report contained in Subdivision 16 of the Master's Findings of Fact on page 5 of said Special Master's report, which finding was in words and figures as follows:

> "16. That on or about June 10th, 1929, and within four months next preceding the filing of the petition herein, the said alleged bankrupts, Phoenix Plumbing & Heating Company, a copartnership, and Leo Francis, Lyon Francis and D. L. Francis, did, while insolvent, transfer and pay over to Standard Sanitary Manufacturing Company, a corporation, creditor, a portion of their property, to-wit, money in the sum of Thirteen ($13,000.00) Dollars with intent to prefer said creditor over their other creditors."

and to which find the following objection was made:

> "That said finding of fact has no foundation in the evidence submitted, because it appears affirmatively in the report of the evidence and by Respondent's Exhibit 'C' in the evidence that Phoenix Plumbing & Heating Company did on the 5th day of March, 1929, assign and set over to the Standard Sanitary Manufacturing Company all its right, title and interest to the money owed the Phoenix Plumbing & Heating Company by the Lincoln Mortgage Company on a certain contract which the Phoenix Plumbing & Heating Company then had with the Lincoln Mortgage Company, and that said assignment contained an order to the Lincoln Mortgage Company to pay to the Standard Sanitary Manufacturing Company all of the moneys owing or to become due from

the Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company."

and that said objection as overruled was based on the following evidence in the case:

Respondent's Exhibit "C" in evidence, which is in words and figures as follows:

"March 5, 1929.

Standard Sanitary Mfg. Co.,
447 East Jefferson St.,
Phoenix, Arizona.

Gentlemen:

You are by this instrument authorized to draw on Lincoln Mortgage Company of this city in the amount of Fourteen Thousand One Hundred Ninety-six Dollars, Seventy-seven cents ($14,196.77),

Which sum represents money due this firm for work and materials furnished in the construction of various houses and store buildings owned by the aforesaid Lincoln Mortgage Company.

"This assignment effective this date.

"Phoenix Plumbing & Heating Co.,
By D. Francis."

(Marked Respondent's Ex. No. "C" in Evidence).

The Check of the Lincoln Mortgage Company was introduced in evidence, being Petitioners' Exhibit No. 34. This is a check for Fourteen Thousand ($14,000.00) Dollars drawn on the Citizens State Bank of Phoenix to the Phoenix Plumbing & Heating Company and endorsed on the back "Phoenix Plumbing & Heating Com-

pany, Cliff B. Fryberger, Mgr." All the evidence in the record on this subject is the testimony of Mr. Cliff Fryberger (Trans. Vol. 3, p. 391), beginning at line 27 and ending at line 27, page 392:

"Q. In regard to the amount of money paid by the Lincoln Mortgage Company, when was the date you went to work for the Phoenix Plumbing & Heating Company?

A. I think June 5th.

Q. And it was on that date that payment was made by the Lincoln Mortgage Company?

A. Several days later.

Q. Isn't it a fact that the way that was handled a check was made to the Phoenix Plumbing & Heating Company for $14,000?

A. Yes, sir.

Q. And the check was endorsed over by the Plumbing Company to the Standard Sanitary?

A. No sir. I went to the Citizens Bank and had two cashier's checks made, one for $13,000 and one for $1,000.

Q. Taken to the bank by yourself.

A. Yes.

Q. And you took in place thereof a check for $13,000 to the Standard Sanitary Company and a check for $1,000 to the Phoenix Plumbing & Heating Company.

A. Yes.

Q. So that $13,000 never went through the books of the Phoenix Plumbing & Heating Company?

A. It had to go through the books.

Q. You took the check?

A. It went through the books.

Q. Then your books showed a credit of $1,000 you received?

A. We had to show it to the credit of the Lincoln Mortgage Company to settle their account.

Q. And the Lincoln Mortgage Company account was assigned to the Standard Sanitary in March?

A. So I understand."

(Also the tstimony of Leo Francis, Vol. 1 Transcript, beginning at the top of page 172 and ending at page 173).

"Q. In your testimony yesterday you were asked about the Lincoln Mortgage Company claim; isn't it a fact that you gave the Standard Sanitary Manufacturing Company an order on the Lincoln Mortgage Company for all the money due on March 5th?

A. Dee gave them.

Q. But you knew about it?

A. Yes, I had heard them talk of it.

Q. It was agreeable to you that they should be given?

A. Yes.

Q. It was given on March 5th?

A. I couldn't say; it was in 1928.

Q. I hand you Respondent's Exhibit 'C' for Identification and will ask if yo uever saw that before?

(Witness examines paper.)

A. I would not say that I have seen it; but I talked with Mr. Bowers about it.

Q. You knew we had it?

A. Yes.

Q. The Lincoln Mortgage Company accepted it?

A. Yes.

Q. So that your interest in that amount of money ended there?

A. It was to apply on our account.

Q. So the truth of it was that in March, 1929, your books showed a debt of $45,000 reduced by the amount of that assignment, so far as the Standard Sanitary Company was concerned?

A. They gave us credit when they collected that $13,000.

Q. Your account was secured to that extent on the 5th of March and it increased your purchasing power to that extent, didn't it? It was their money from the time you turned that order over to them, wasn' it? A. Yes.

Q. The Phoenix Plumbing & Heating Company did not receive any money from the Lincoln Mortgage Company in June?

A. It was paid direct to the Standard Sanitary Company.

Q. On the 5th of March we all knew how much money was coming to you on that job?

A. Yes.

Q. And you knew how much of the Standard Material you were going to need to finish it, didn't you?

A. Yes.

Q. And in March it was collected, wasn't it?

A. You mean, the Lincoln Mortgage Company?

Q. Yes. A. Yes.

Q. When you gave this order to the Standard Sanitary, the work you were doing for the Lincoln Mortgage Company was pretty well cleaned up, wasn't it? A. Yes.

Q. There was only a little more labor and material to go in there?

A. Before that payment we done some work on some of the other jobs..

Q. That was labor, wasn't it?

A. Yes."

Also testimony of D. L. Francis contained in Volume 2 of the Transcript, page 329, to the effect which is as follows: (The testimony is in regard to Respondents' Exhibit "C" filed herein).

Q. I call your attention to Respondents' Exhibit 'C' for Identification; have you ever seen that before?

A. Yes, sir.

Q. Did you sign that? A. Yes.

Q. And delivered it to the Standard Sanitary Company?

A. Yes.

Q. On the 5th of March? A. Yes."

II.

The Court erred in overruling the objections of the Standard Manufacturing Company to that portion of the Special Master's report contained in subdivision 4 of the conclusions of law of the said Special Master's report, which is in words and figures as follows, to-wit:

"4. That the said alleged bankrupts and each of them did, on or about June 10th, 1929, and within four months next preceding the dateof filing of the involuntary petition herein, commit a further act of bankruptcy by transfering and paying over, while insolvent, to Standard Sanitary Manufacturing Com-

pany, a corporation, the sum of Thirteen Thousand Dollars ($13,000.00) in money."

for the following reasons:

"(1) That it affirmatively appears by the evidence in the case that the said $13,000.00 was assigned to the Standard Sanitary Manufacturing Company by the Phoenix Plumbing & Heating Company and the Lincoln Mortgage accepted such assignment on the 5th day of March, 1929, and that thereafter the Phoenix Plumbing and Heating Company had no control, interest or right in the said $13,000.00 and that the same was not transferred and paid over by the Phoenix Plumbing and Heating Company while insolvent on or about the 10th day of June, 1929.

"(2) Because it affirmatively appears by the testimony of D. L. Francis (Rep. Trans. Vol. 2, p. 329) and by the evidence of Fryberger (Rep. Trans. Vol. 3, pp. 391-392) and by Respondents' Exhibit 'C' in evidence, that full and complete title to the said $13,000.00 passed to the Standard Sanitary Manufacturing Company on the 5th day of March, 1929, and that there does not appear in the evidence, findings of fact or conclusions of law any proof that the Phoenix Plumbing and Heating Company was not a solvent, going concern on the 5th day of March, 1929."

III.

The Court erred in overruling the objections of the Standard Sanitary Manufacturing Company to that portion of the Findings of Fact of the Special Master's Re-

port contained in subdivision 5 of said Special Master's Report, which is in words and figures as follows:

> "3. That said Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, Lyon Rrancis and D. L. Francis, was at the date of filing of the petition herein, now is, and has been for more than four months next preceding the date of filing of the petition herein, insolvent."

for the reasons:

> "(1) That nowhere in the evidence upon which the said Master's Report, Findings of Fact and Conclusions of law are based does there appear any proof of insolvency prior to the 20th day of July, 1929, but that in truth and in fact the evidence contained in the Reporter's Transcript shows conclusively that at all times up to and including the 22nd day of June, 1929, the Phoenix Plumbing and Heating Company was a solvent, going concern and was so treated by all of its creditors, including the petitioning creditors herein, and that upon all the evidence the findings of insolvency should have been the 20th day of July, 1929.
>
> "(2) That the evidence of Jerry Lee, the auditor who testified in this case did not reveal insolvency on the part of these alleged bankrupts until the 30th day of April, 1929, as shown by the statement of assets and liabilities compiled by the said Jerry Lee and admitted in evidence as petitioning creditors' Exhibit No. 25, and for the further reason that the examination of the said Jerry Lee upon the said statement of assets and liabilities contained in Volume III of

the Transcript of Evidence, pages 400 to 523 revealed that the said statement is not a fair, equitable and just statement of the assets and liabilities of the said alleged bankrupt."

ARGUMENT.

Assignments of Error I and II are based upon the proposition that the $13,000 paid to the Standard Sanitary Manufacturing Company on or about the 10th of June, 1929, had become the property of the Standard Sanitary Manufacturing Company on the 5th day of March, 1929, more than four months prior to the date of adjudication in bankruptcy of the Phoenix Plumbing & Heating Company.

As set forth in the statement of facts herein, it is the contention of appellant that all of the title the Phoenix Heating & Plumbing Company had to that certain fund in the hands of the Lincoln Mortgage Company, being the balance due the Phoenix Plumbing & Heating Company for work performed upon a number of buildings for the Lincoln Mortgage, had passed to the Standard Sanitary Manufacturing Company on the 5th of March, 1929, by virtue of the assignment which is set forth in the statement of facts herein, and is Respondents' Exhibit C in Evidence.

This assignment constituted not only an assignment but an order to the Lincoln Mortgage Company for the sum of $14,196.77, and, as stated in the said assignment, that sum represented money due the Phoenix Plumbing

& Heating Company for work and materials furnished in the construction of various houses and store buildings owned by the aforesaid Lincoln Mortgage Company. From the 5th day of March, 1929, the Phoenix Plumbing & Heating Company had no jurisdiction whatsoever over this money and had no right to draw on the same or demand any portion thereof from the Lincoln Mortgage Company. The court will note that the testimony of Leo Francis, who claimed to be the proprietor of the business, and who, according to all the evidence, was clearly one of the partners, was to the effect that the Lincoln Mortgage Company accepted this assignment on the 5th day of March (Statement of Evidence, p. 335). This evidence of acceptance on the part of the Lincoln Mortgage Company was not repudiated by any evidence produced by the petitioning creditors, so that insofar as the assignment and order contained in Respondent's Exhibit C is concerned, we have an assignment by the Phoenix Plumbing & Heating Company to the Standard Sanitady Company on the 5th day of March of a definite liquidated amount in the hands of the Lincoln Mortgage Company. In other words, a specific fund to which full title and right was transferred from the Phoenix Plumbing & Heating Company to the Standard Sanitary Manufacturing Company on the 5th day of March.

Applying the fundamental test of bankruptcy law to this transaction, the question is asked, could the Phoenix Plumbing & Heating Company at any time after the 5th day of March, 1929, exercise any right, control or claim upon the $14,000 assigned in Respondent's Exhibit C,

or could any representative, successor or assignee of the Phoenix Plumbing & Heating Company make any claim or exercise any right over the said fund after the execution of said assignment? It is our contention that under the law laid down by the United States Supreme Court and the Circuit Courts of Appeal of the various circuits of the country, neither the Phoenix Plumbing & Heating Company nor any of its successors in interest, and in particular its Trustee in Bankruptcy, had any jurisdiction, interest or control over the sum of money so assigned after the 5th of March. Reverting again to the facts in the case, we wish to call the court's attention to the way this money was handled when the various jobs were completed and the Lincoln Mortgage Company was ready to pay therefor—Fryberger, the then Manager of the Pheonix Plumbing & Heating Company, and Nihell, the Manager of the Standard Sanitary Manufacturing Company, went to the Lincoln Mortgage Company and received a check which was made payable to the Phoenix Plumbing & Heating Company but delivered to these two men, who thereupon went to the bank upon which the check was drawn and deposited the same, and by mutual agreement two cashier's checks were drawn, one for the $13,000 to the Standard Sanitary Manufacturing Company, and the balance, one thousand and odd dollars, to the Phoenix Plumbing & Heating Company. As it appears in the testimony, the Standard Sanitary Manufacturing Company permitted this disposition of the money so as to save the Phoenix Plumbing & Heating Company in its payroll (p. 442 Statement of Evidence).

In the rule which we insist governs the situation here, is set forth the following:

> "The transfer must be of such a nature that the fundholder can safely pay and is compellable to do so, though forbidden by the assignor. When the transfer is of the character described the fundholder is bound from the time of notice."
>
> *Christmas v. Gaines et al,* 81 U. S. Sup. Ct. Rep. 69-84, 20 L. Ed. 762.

And again in the same case the court held:

> "But an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfill all the requirements of the law."

In the above entitled case the court draws the clean-cut distinction between an agreement to pay out of a particular fund which is not an equitable assignment and an actual transfer of all right and title to a specified fund so that the fundholder is obliged to pay according to the terms of said transfer. The court will bear in mind that in the instant case it is not a check; it was not a note; it was an order upon and an assignment of all the money in a specified fund in the hands of a definite party, which said order was accepted by the party holding the fund. Again the court laid down the rule under different circumstances as follows:

> "A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund,

> is not an assignment of the fund, even in equity; but, to make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the assignee, even where the circumstances do not admit of its immediate exercise and to divest the assignor of control over the fund."

Smedley et al v. Speckman, 157 Fed. 815.

Again, in the case of *In re McLoon,* where a woman executed a mortgage to her son more than four months prior to the bankruptcy, and which mortgage was not recorded until long after the four months preceding the petition in bankruptcy had begun to run, the court held that the conveyance was made in good faith to secure aid and to secure further advances, and that the alleged bankrupt believed herself to be solvent at the time, and, therefore, the assignment or mortgage was held good and not an act of bankruptcy.

In re McLoon, 162 Fed. 575; see also
In re Harvey, 212 Fed. 340.

In the last named case the question before th court was the distinction between an actual pledge and an agreeeement to give a pledge. In the instant case we have something not a pledge; we have an absolute transfer of title made on the 5th of March, more than five months prior to the adjudication in bankruptcy. Referring to the decision of the court in the McLoon case, supra, as to solvency or insolvency appearing there, the

question of the insolvency of the alleged bankrupts in the present case will be discussed more fully under the third assignment of error, but we contend that in the instant case there was no real evidence of insolvency at any time prior to the 20th of July. Up to that time the alleged bankrupts, and all of their creditors, considered and treated the Phoenix Plumbing & Heating Company as a solvent, growing concern, and the facts in the record on this proposition will be discussed more fully under our assignment of error No. 3.

It will be contended that this assignment was a secret one and in defraud of the creditors, but we call the court's attention to the fact that the allegation of the petitioning creditors petition in involuntary bankruptcy covering this transaction, is not that the transfer was made with intent to hinder, defraud or delay creditors, as set forth in the Act of Bankruptcy under subdivision 1 of subsection (a), but is brought under subdivision 2 which makes an act of bankruptcy of the transfer while insolvent of any portion of his property to one or more of his creditors, with intent to prefer such creditor over his other creditors. Under the later allegation this case must stand or fall, and we submit that there is not one scintilla of evidence to the effect that at the time the assignment was made on the 5th day of March did there appear any intent on the part of the Phoenix Plumbing & Heating Company to prefer the said creditor over any other, but that on the contrary the assignment was made to pay a portion of a then existing debt and to secure future credit from the particular creditor. At the time this assignment was

made the Phoenix Plumbing & Heating Company owed some money to the bank and small amounts to various creditors, the largest individual creditor at that time being the Standard Sanitary Manufacturing Company; but it also appears that at the time the assignment was made the potential assets of the Phoenix Plumbing & Heating Company exceeded by a large amount its liabilities. It had a large number of contracts for the installation of plumbing in public buildings. All of these jobs were bonded and there was ample security at that time for all of its debts; in other words, at the time of the assignment on the 5th of March the Phoenix Plumbing & Heating Company was a solvent, going concern, within the meaning of the Bankruptcy Act, which situation will be more fully shown under the succeeding assignment. Again, the Circuit Court for the District of Oregon held that where a contract was entered into between an alleged bankrupt and a creditor by the terms of which the bankrupt agrees to transfer certain property specifically named, in consideration of the advancement of money by the other party to the contract, and the said contract of transfer was not carried out until after the four months prior to the adjudication in bankruptcy had begun to run, such a transaction did not constitute a preference.

Sabin v. Camp, 98 Federal 974.

The court will bear in mind that the allegation of the petitioning creditors was that this act which they claim was an act of bankruptcy was done with the intent to prefer, hence if under the law the assignment of the Lincoln

Mortgage Company was not a preference it is not an act of bankruptcy.

Again, the Circuit Court of Appeals in the Sixth District held—

> "Where complainant purchased a quantity of lumber, to be manufactured and shipped to it by the bankrupt, advancing large sums before the lumber was sawed, complainant acquired an equitable lien on lumber piled in the yards of the bankrupt and intended to be applied on complainant's contract for the balance of advances, etc., which was enforceable as against the bankrupt's trustee."

Gage Lumber Co. v. McEldowney, 207 Fed. 255.

The analogy of the foregoing case and the case at bar is very clear. In the instant case the Standard Sanitary Manufacturing Company advanced and was advancing large amounts of material to the Phoenix Plumbing & Heating Company to be installed in various jobs the Phoenix Plumbing & Heating Company then had under contract. To secure past advances and to secure future advances of material the Phoenix Plumbing & Heating Company gave the assignment of the money in the hands of the Lincoln Mortgage Company and which was due or would become due the Phoenix Plumbing & Heating Company. There was no intent to prefer. It was simply a transaction such as appeared in the Gage Lumber Company case against McEldowney, supra; hence, under the above cases it cannot be held that this assignment was made with intent to prefer.

See also *Fourth Street National Bank v. Yardley,* 165 U. S. 633; 41 L. Ed. 855.

Mr. Justice White (afterwards Chief Justice of the Supreme Court), in delivering his opinion in the above cited case, used this language:

> "That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court." (Citing a large number of cases).
>
> "Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if, in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice."

It will be noted that in the above citation appear the words "parties charged with notice." In this connection we wish to call the court's attention to the fact that there is no provision in the state laws of Arizona by which assignments of the nature of the instrument introduced in evidence in this case as respondent's Exhibit C, as set forth above, are required to be recorded. It is not a chattel mortgage; it is not an assignment for the benefit of creditors; it is a transaction between three parties, in

this case the Phoenix Plumbing & Heating Company, the Standard Sanitary Manufacturing Company, and the Lincoln Mortgage Company. The Standard Sanitary Manufacturing Company had express notice, the Lincoln Mortgage Company accepted the assignment, and the Phoenix Plumbing & Heating Company made it; hence, all three were parties, and the Trustee in Bankruptcy of the Phoenix Plumbing & Heating Company is bound by and charged with every equity and notice that the Phoenix Plumbing & Heating Company had. Hence, if the Trustee in Bankruptcy could not obtain control over the subject matter of the assignment by virtue of any right the Phoenix Plumbing & Heating Company had in the same, then the transaction was not a preference and not an act of bankruptcy under the specific allegation of the petitioner's bill, upon which this whole bankruptcy matter is based. To constitute this transaction an act of bankruptcy there must have been an intent to prefer one creditor over another, and we submit that as to the time of this assignment there is not one bit of evidence in the record to show any intent on the part of the Phoenix Plumbing & Heating Company to prefer a creditor. Again, in the District Court of Pennsylvania, the following decision in a case where an order was given in the following language:

> "Please pay to the order of . . . . the sum of . . . . . out of any balance due us remaining in your hands."

operated as an equitable assignment of that part of the

fund designated in the order, and in deciding the case the court used the following language:

> "The conditions required to constitute an effective assignment are that the fund shall be designated, and the order to pay unconditional. The language of this letter is sufficiently specific on these points, under the decisions of the Supreme Court of the United States and the Supreme Court of this state."

In re Hanna, 105 Fed. 587.

Practically all of the elements in the case at bar are present in the case of *In re Hanna,* and a careful check of later cases reveal that the case of *In re Hanna,* supra, is still the law in Federal jurisdiction.

See also, on the question of what constitutes an equitable lien good as against the claims of a trustee in bankruptcy, the case of *Fee-Crayton Hardware Co. v. Richardson Warren Co.,* 18 Fed. (2nd) 617. See also note at bottom of page 865 in Book 41 L. Ed.:

> "Every express executory agreement in writing, whereby the contracting party sufficiently indicated an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors,

voluntary assignees and purchasers, or encumbrancers with notice."

See note bottom page 866, 41 L. Ed. in connection with the case of *Walker v. Brown.*

There is no question but that the assignment made by the Phoenix Plumbing & Heating Company to the Standard Sanitary Manufacturing Company on the 5th day of March, 1929, had all of the necessary elements of an equitable lien under federal practice, and under the cases cited above the enforcement of that lien, even when made within four months of the adjudication of of bankruptcy, was good as against the trustee in bankruptcy and the creditors of the bankrupt estate.

See *Fee-Crayton v. Richardson et al,* supra, in which the federal courts held that the authority for the creation of an equitable lien arose out of the federal constitution and was not amenable to state laws. The above doctrine as enunciated was applied in the case of *In re Stiger,* 202 Fed. 791 (Bankruptcy case). In that case the bankrupt was adjudicated a bankrupt in involuntary proceedings instituted against him on the 8th day of June. An assignment had been executed the 17th day of January of the book accounts of the alleged bankrupt. The holder of the assignment petitioned to assert his right to the accounts on the ground that the same were assigned more than four months prior to the adjudication in bankruptcy. The court applied the test laid down in the above cited case, using this language:

"Where enforcement of an agreement to assign is sought, it is essential that there was a purpose to presently transfer all that the assignor had or was to obtain in the funds or accounts which are the subject of the transaction. The sure criterion is whether the transaction between the parties, if assented to by the debtor of such alleged assignor, creates an absolute personal indebtedness payable by him to such alleged assignee, or whether it creates merely an obligation by such assignor to make payment out of that particular debt. If the former, an equitable property in the debt, and not a mere right of action against such primary debtor, passes to such assignee, and an equitable assignment is effected."

In re Stiger, 202 Fed. 791.

In the Stiger case the facts did not stand up to the test applied in the foregoing quotation, but we submit that in the instant case every element required by the test set forth by the court in the Stiger case is met. On the 5th of March an absolute assignment and an order upon the Lincoln Mortgage Company for all moneys then due or to become due the Phoenix Plumbing & Heating Company was made to the Standard Sanitary Manufacturing Company and accepted by the Lincoln Mortgage Company. These are all the elements required to make an assignment good as against the trustee in bankruptcy of the Phoenix Plumbing & Heating Company.

See also *United States v. D. L. Taylor Co.,* 268 Fed. 635.

Again, in the District Court of Massachusetts, in the case of *In re Theodoropulos,* 11 Fed. (2nd) 909, Judge Morton held as follows:

> "A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. To make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right in the party meant to be provided for, even where the circumstances do not admit of its immediate exercise." (Quoting *Smedley v. Speckman,* 157 Fed. 815).

The learned judge, then proceeding to apply the test laid down in the above quotation to the case before him, held that that case constituted at best a mere promise to convey, but in the instant case there was no promise—there was an immediate assignment of all right, title and interest in the fund in the hands of the Lincoln Mortgage Company.

> See also the case of *McDonald et al v. Daskan,* 116 Fed. 276.

In that case an equitable assignment of the proceeds of a fire insurance policy as collateral security for a loan was made more than four months prior to the adjudication in bankruptcy, and the actual delivery of the policies was made after a fire had occurred and within four months of the adjudication in bankruptcy, and the Circuit Court of Appeals of the Seventh Circuit held that

the assignment was good as against the trustee in bankruptcy and did not constitute an unlawful preference and an act of bankruptcy. Much the same situation exists in the instant case. The assignment was made, and if the jobs which the Phoenix Plumbing & Heating Company had performed and was performing for the Lincoln Mortgage Company were completed on the 5th of March, the money would have been paid as of that date, but it did not become available until June, as in the case cited above the proceeds of the fire insurance policies did not become available until after the fire. In both cases the actual payment of the money was made within the four months, and we submit that the case cited above is clearly in point and decisive of the question raised under this assignment of error.

See also the case of *Hurley v. A. T. & S. F. R. R.*, 213 U. S. 126; 53 L. Ed. 729.

which holds that the advancing of materials and money may be secured by an equitable lien and the same satisfied within the four months prior to bankruptcy.

In the case of *Union Trust Co. v. Bulkeley*, 150 Fed. 519, the Circuit Court of Appeals of the Sixth Circuit held that—

> "A parol assignment by a man in business of the accounts and bills receivable which he should acquire in the course of such business to secure a person for becoming his indorser to enable him to raise money for use in the business creates a valid lien as against

> the assignor's trustee in bankruptcy where the assignment was made in good faith, although no notice of the same was given to creditors, and the notes and accounts remained in the possession of the assignor until his bankruptcy."

In that case the court apparently examined the statutes of the State of Michigan, in which the subject matter of the case arose, and found that the laws of the state were silent on the question of such assignments and held that it was a good assignment and that the same did not constitute a preference and gave the trustee in bankruptcy no rights in the subject matter of the assignment. It will be noted in that case that the accounts remained in the hands of the bankrupt up to the date of his adjudication.

ASSIGNMENT OF ERROR No. 3.

Assignment of Error No. 3 is based upon the proposition that all of the evidence introduced before the Special Master, whose report was confirmed by the judge of the District Court in an order confirming the same and adjudicating the Phoenix Plumbing & Heating Company a bankrupt, is based upon the proposition that the insolvency of the Phoenix Plumbing & Heating Company was not established by the evidence as of the 17th of April, 1929, or any date prior thereto. To narrow the scope of the foregoing proposition, we will at the outset state that there is no clear indication of insolvency up to the very date of the adjudication. As is shown in the record filed herein, a receiver was appointed

by the District Court on the 17th day of August, and at or about the 17th of August those jobs which were bonded and upon which the Phoenix Plumbing & Heating Company had been working up to that time, were taken over by the various bonding companies. There is a statement of the financial condition of the Phoenix Plumbing & Heating Company in evidence as of July 20, 1929, being petitioner's Exhibit No. 35, which shows some indication of insolvency as of that date. It is true that Mr. Jerry Lee, the auditor who testified for the petitioning creditors, attempted to show by two statements, one dated April 30, 1929, and appearing in the record as petitioner's Exhibit No. 25 in evidence, that the bankrupt was insolvent on the dates named. This statement sets up a deficit of $30,165.82 in the assets of the concern, and this deficit was arrived at by the auditor under circumstances which tend to show that it was just a guess upon the part of the auditor.

In order that the court may have the full picture of the situation, as it appeared at the time of the hearing before the Special Master, we wish to cite the facts surrounding this financial statement of April 30, 1929, prepared by the Southwest Audit Company. Mr. Lee, of the Southwest Audit Company, was retained by the petioning creditors to make an audit of the Phoenix Plumbing & Heating Company's books after the petition in involuntary bankruptcy had been filed. Some time in August, 1929, Mr. Lee had been retained by a number of bonding companies to audit the books of the Phoenix Plumbing & Heating Company to enable them to settle

with the material men who had claims against the bonds of the company arising out of materials furnished to the various bonded jobs upon which the Phoenix Plumbing & Heating Company had been working. Mr. Lee in his work for the bonding companies had access to the books of the Phoenix Plumbing & Heating Company and also had access to the books of the various creditors, concerns who had furnished plumbing supplies and materials to the Pheonix Plumbing & Heating Company and which had been incorporated in the buildings covered by the bonds of the various surety companies who employed Mr. Lee. With this material Mr. Lee was able to obtain a very accurate and clear-cut statement of the amounts due on the various jobs, the amount of money paid the Phoenix Phoenix Plumbing & Heating Company, and upon his figures the bonding companies were able to make satisfactory settlements with the material men involved.

But when Mr. Lee was retained by the petitioning creditors to make up the financial statement of the Phoenix Plumbing & Heating Company for use in the hearing, he disregarded the vast amount of data he had collected for use with the bonding companies and proceeded to make up statements for the petitioning creditors which would show insolvency. And to obtain this result Mr. Lee, by his own admissions in his cross-examinations by counsel for the Standard Sanitary Manufacturing Company, admitted that he had disregarded the information which he had obtained for the bonding companies and which if used in his testimony and in his statements

which appeared in petitioners' Exhibit No. 25 would have made a material difference in the total of assets and potential assets of the Phoenix Plumbing & Heating Company.

As will appear in the Statement of Evidence, on April 21, 1929, an explosion in the office of the Phoenix Plumbing & Heating Company took place. Attempts were made by attorneys for petitioning creditors to show that this explosion was caused by one or more of the copartners of the Phoenix Plumbing & Heating Company. Suffice it to say that the Phoenix Police Department made an examination of the situation and took no action in the matter whatsoever. Two of the books of the alleged bankrupt disappeared after the explosion, a cash book and a ledger. All of the partners in the Phoenix Plumbing & Heating Company denied any knowledge whatsoerer of the explosion, though they could not account for the missing books. Mr. Jerry Lee, in his testimony, tried to make out that the absence of these two books were the cause of his being unable to make a more satisfactory statement of the condition of the Phoenix Plumbing & Heating Company, although he admitted in his cross-examinations that the books he used in arriving at the audit were probably more than he needed. (Statement of Evidence, p. 513).

In arriving at the financial statement of April 30th, which was made in October, 1929, Mr. Lee admitted in cross-examination that, although there was available to him figures which would give an accurate statement of

the total amount of money which was due and payable and to become due and payable to the Phoenix Plumbing & Heating Company as of April 30, 1929, and that there was available to him facts and figures which would show the amountof money which was actually received by the Phoenix Plumbing & Heating Company after April 30, 1929, yet he gave no credit whatsoever for the amounts of money which upon the face of it were due and payable, with all work completed or practically all work completed on April 30, 1929. In arriving at the liabilities Mr. Lee set up every cent of the amounts due the Standard Sanitary Manufacturing Company, the Crane Company, and other material houses for materials furnished to the Phoenix Plumbing & Heating Company, and although Mr. Lee could and did trace every bit of material furnished by the Standard Sanitary Manufacturing Company to the city hall job in the amount of some sixteen thousand dollars, yet he made no attempt to give any credit whatsoever to the Phoenix Plumbing & Heating Company for materials which appeared as liabilities in the assets of the Phoenix Plumbing & Heating Company, though he could have traced the material to the various jobs. In fact Mr. Lee did trace the material from the Standard Sanitary Manufacturing Company to the various jobs which were covered by the bonds of the surety companies who retained him in August for that purpose, yet, in making up his statements which were submitted in evidence before the Special Master, he deliberately disregarded all of this work which he had done in tracing this material to the various jobs and did not give credit for the amounts of money that were due

and payable to the Phoenix Plumbing & Heating Company from these various jobs on April 30, 1929. In other words, this statement of Mr. Lee (petitioners' Exhibit No. 25), dated April 30, 1929, charged as a liability all of the cost of materials furnished by the various material houses, and then deducted $30,165.82 of these materials charged as liabilities from the assets; so that it is our contention that the financial statement of April 30, 1929, charges as liabilities the sum of $62,059.73, being the material furnished by various material houses and incorporated in the jobs which were listed as contracts receivable in the assets, and that $30,165 worth of the same materials, already fully charged in the liabilities, were deducted from the contracts receivable by Mr. Lee.

If Mr. Lee had given credit on the contracts receivable for this amount then his statement would show that on the 30th of April, 1929, the Phoenix Plumbing & Heating Company was a solvent, going concern. In Mr. Lee's cross-examination he admitted that he found various amounts of money due the Phoenix Plumbing & Heating Company which he did not credit in the asset column. On page 527 of the Statement of Evidence he admitted that there was $8,000 due on the city hall job, and various amounts on the other jobs, yet admitted that he did not put them in as assets of the company. He admitted that the bonding companies collected these moneys from the owners of the buildings as they took the jobs over, and yet with all this evidence of facts and figures before him he disregarded the same and charged the materials billed to the Phoenix Plumbing & Heating Com-

pany as liabilities and then deducted fifty per cent of that amount from the assets for the purpose of showing a deficit. We submit, therefore, that Mr. Lee's statement is not proof of insolvency, and that as a matter of fact the first evidence of insolvency on the part of the Phoenix Plumbing & Heating Company that appears in the record was in the statement of July 20, 1929, and that that statement was the only one based upon actual facts and figures having been compiled by the joint efforts of the bookkeeper, the Commercial National Bank cashier, the manager of the Standard Sanitary Manufacturing Company, and the manager of the Phoenix Plumbing & Heating Company, but at no time prior to that date does there appear any real evidence of insolvency. Now, the rule developed in bankruptcy cases by the United States courts applied to the foregoing acts shows clearly that the allegation of the petitioning creditors of insolvency and the finding of the Master that the Phoenix Plumbing & Heating Company was insolvent for more than four months prior to the 17th of August, 1929, are not borne out by the facts.

In the early case of *Rome Planing Mill,* 96 Fed. 812, the court held that the burden of proof is on the petitioning creditors to establish the insolvency where the allegation of an act of bankruptcy is under the provision of subdivision 2, and goes on to say that the burden is upon the petitioner to show such insolvency as of the date of the transfer. In the instant case the bankrupt firm by its members, the three partners, appeared and submitted themselves to examination and delivered up all of their

books except those destroyed by the explosion. They denied any participation in the explosion, and no proof was adduced to tie them to the explosion. Hence, under the ruling case the burden was upon the petitioners to prove insolvency as of the date of the transfer. Under the facts as they appear in the record there is no proof of insolvency until July 20th, at the earliest, and regardless of what action the court might take as to the equitable assignment and transfer of March 5th of the Lincoln Mortgage Company, and even if it be held that the actual transfer took place on the 10th of June, still we submit that under the authority of the ruling case, supra, the proof of insolvency was not made until the 20th of July. As to the question of what constitutes insolvency, the cases are very clear as to the test which must be applied. It is not a question of how much cash could be realized at the moment that decides the question of insolvency, it is, Would the fair market value of the property equal the amount of debts?

Dundan v. Landis, 106 Fed. 839, at p. 858.

The only evidence that appears in the record as to what the actual value of the contracts receivable were at any time up to July 20th is in the statement of Leo Francis, who in his testimony stated that he believed that if he could liquidate and turn into cash his contracts receivable at any time prior to adjudication of bankruptcy, there would have been more assets than liabilities in the Phoenix Plumbing & Heating Company (Statement of Evidence, p. 341); so, too, where the alleged bankrupt be-

lieves that he is solvent and acts accordingly he rebuts the assumption of an intent to prefer which arises from an act of insolvency. See

In re Gilbert et al, 112 Fed. Repr. 951—

> "Insolvency is no longer inability to pay debts in the regular course of business, but exists only 'whenever the aggregate of (the bankrupt's) property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.' "

In re Pettingill, 135 Fed. Repr. 218.

Again, another test of insolvency is contained in the following language:

> "On issue of insolvency, fair reasonable value of alleged bankrupt's property is to be determined from evidence as of date of alleged act of bankruptcy, and not from subsequent history of property."

In re Cleveland Discount Co., 9 Fed. (Second) 97.

We wish to call the court's attention again to the attempt made to show insolvency on April 30th by Mr. Lee. If his statement had shown all amounts of money due and payable, or to become due and payable, by virtue of the contracts receivable on April 30, 1929, and if he had given credit on the assets side of the ledger for all of the materials which could be traced to the various

buildings, and evidence had been submitted of the fair value thereof as of April 30, 1929, the statement then would show that the assets exceeded the liabilities, but this statement which does show a deficit of $30,000 was made upon an erroneous juggling of figures, in that all material furnished was set up as liabilities, and instead of giving a credit on the assets side for these materials still in the control of the Phoenix Plumbing & Heating Company and for which they were entitled to payment from the owners of the buildings in which they were incorporated, he deducted $30,000 from these contracts receivable, which in effect were but statements of the material and labor furnished in these various buildings from the assets; in other words, all liabilities were set up at one and one-half times their actual value, while the assets and potential assets were set up at one-half their actual value. As to the true test of insolvency see—

In re Chappell, 113 Fed. 545.

There the court held that the test was whether or not the aggregate property assets of the alleged bankrupt exceeded his liabilities at the time in question. See also—

In re Crystal Ice & Fuel Co., 283 Fed. 1007,

in which Judge Bourquin wrote the opinion and in which the question of what constitutes insolvency under the Bankruptcy Act is discussed at length, holding that the evidence must be clear as to whether or not the insolvency upon which the petition in bankruptcy is predicated is in-

solvency as defined under the Bankruptcy Act, or other forms of insolvency. As to the burden upon the petitioning creditors to show insolvency, see also—

Mansfield Lumber Co. v. Sternberg,
38 Fed. Repr. (Second Series) 615.

The rule laid down in the circuit courts as to when insolvency must be shown is contained in the following cited cases, which hold to the following test:

> "In determining the question of the solvency of a bankrupt, who conducted and owned the furniture in a hotel, at the time he executed a mortgage to a creditor claimed to be preferential, his property must be valued as that of a going concern, and not what it was worth as dead property after bankruptcy had intervened."

In re Klein, 197 Fed. 241.

In re Marine Iron Works, 159 Fed. 753, again—

> "The question of insolvency must be decided as of time before bankruptcy when the bankrupt was in charge of the business."

In re Bucyrus Road Machinery Co. v. Edsinger,
10 Fed. (2nd) 333.

As was stated heretofore in this brief, the first time that any clear-cut proof of insolvency appears in the record herein was on July 20th, and that proof is not sufficient to show insolvency at the time of the assign-

ment of the Lincoln Mortgage Company money as set forth hereinabove. Proof that a man was insolvent on a certain day is not proof tthat he was insolvent on a day prior thereto. Many contingencies, such as unwise investments, losing contracts, etc., might happen to reduce a person from a state of solvency to one of insolvency within a short space of time.

Kimball v. Dresser, 57 Atl. 787;
In re Chappell, 113 Fed. 545;
B. F. Goodrich Rubber Co. v. Valley Lbr. Co., 267 S. W. 1036.

Again, the exact time of insolvency must be shown, for it has been held that a finding of insolvency at some time between the years 1907 and 1915, but no definite date in that period, cannot be used affirmatively to establish insolvency in 1915.

Millard v. Green, 110 Atl. 177.

It is our contention that the statement contained in the Master's Report to the effect that the Phoenix Plumbing & Heating Company was insolvent for a period of more than four months prior to the 17th day of August, is not based on the record, as there does not appear any evidence of insolvency prior to July 20th, 1929, which was not four months prior to the date of adjudication. It is our contention that a careful analysis of the two financial stamtamsnets made by Jerry Lee (petitioners' Exhibit No. 25 in evidence) which purport to show the financial condition of the Phoenix Plumbing & Heating

Company on April 30th and August 17th, would show upon their face that the said statements do not contain the true facts and figures. An examination of the cross-examination of Jerry Lee in the Statement of Evidence shows admission after admission on the part of Lee to the effect that he did not use all of the facts and figures available; that he totally disregarded the figures which show assets due and collectible to the Phoenix Plumbing & Heating Company both on the 30th day of April, 1929, and the 17th day of August, 1929; that he took the condition of the bankrupt firm in October and using that as a basis built up these two statements purporting to show its condition at dates a long time prior thereto; that he very carefully included all liabilities and gave no counter-credits for the same in the assets, and then deducted from the assets sufficient amount to make a deficit appear, and finally his admission that the whole thing was an estimate based upon his very evident desire to show the concern insolvent from April 30th on. We submit that the petitioners did not sustain the burden of proving insolvency as of the time of the Lincoln Mortgage Company assignment took place and that the finding of the Master to the effect that this transfer was made at a time when the Phoenix Plumbing & Heating Company was insolvent, is not sustained by the evidence before him.

CONCLUSION.

The appellant herein respectfully submits that on the 5th day of March, 1929, so far as the record in this case shows, the Phoenix Plumbing & Heating Company was

a solvent, going concern; that on that date the transfer by an assignment in writing of all the right, title and interest in and to the $14,000 owing and to become due to it from the Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company, which said assignment was accepted by the Lincoln Mortgage Company, and that at that time it lost all right, control and right to possession of the said fund, and that the payment of said fund as recited in the evidence on the 10th day of June, 1929, was not a transfer made with intent to prefer one creditor over another but was a payment to the Standard Sanitary Manufacturing Company of an obligation which the Lincoln Mortgage Company had owed and been liable to the Standard Sanitary Manufacturing Company for, from and after the 5th day of March, 1929; and that the finding of the Special Master that the said transfer hereinabove described was an act of bankruptcy, was contrary to the evidence in the record and also to the law governing such action, and that this appellant is entitled to a decision by this honorable court to that effect. That the ruling of the federal court that the said Special Master's report was correct and confirming the same was error, and that this appellant is entitled to a decision declaring said transaction to be not an act of bankruptcy, not an act made with intent to prefer one creditor over another, and that its costs herein expended be taxed against the petitioning creditors and the trustee in bankruptcy.

Respectfully submitted,

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